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PATENTAttorney Reference Number 393-66965-01
Application Number 10/712,783

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Harleigh C. Mason and
Ashley G. Mason

Application No. 10/712,783

Filed: November 12, 2003

Confirmation No. 7792

For: APPLE TREE NAMED 'ROSY GLOW'

Examiner: Susan Beth McCormick Ewoldt

Art Unit: 1661

Attorney Reference No. 393-66965-01

COMMISSIONER FOR PATENTS
P.O. BOX 1450
ALEXANDRIA, VA 22313-1450

DECLARATION UNDER RULE 1.132

1. I, Tony Willcocks, am employed by Fleming's Nurseries Pty. Ltd, Monbulk, Victoria, Australia, (herein Fleming's). I have personal knowledge of activities involving the 'Rosy Glow' cultivar prior to May 31, 2001.

2. Prior to May 31, 2001, the 'Rosy Glow' cultivar was sold to ten Australian orchardists who sell fruit. From July–September 2000, 5,670 total trees were sold to nine orchardists in Australia. In February 2001, 400 trees were sold to one orchardist in Australia. No other sales or other distribution of the trees took place prior to May 31, 2001.

3. All of the Orchardists who received the 'Rosy Glow' cultivar trees mentioned in paragraph 2 above were specifically prohibited from propagating or distributing the trees they received. Each of the Orchardists who obtained the trees entered into a Client Agreement with Fleming's that contained the following paragraph:

"the Client agrees that it is expressly forbidden to undertake or attempt to propagate any numbered plant or plants covered by this agreement, including asexual propagation, mutigenetic alteration, hybridization, including the growing of any seed produced, cutting, tissue culture,

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grafting, budding, top working, nor permit others to do so without the prior written consent from Fleming's."

In the above paragraph, Client refers to the Orchardists who received the trees. Fleming's did not provide any consent to the Orchardists that would permit propagation of these trees. A sample of the Fleming's Client Agreement of the exact type executed by each of the ten orchardists mentioned in paragraph 2 above is provided in Exhibit A.

4. In March 2001, a notice (Exhibit B) was sent to Fleming's Nurseries orchardist customers in Australia only. The notice invited the orchardists to view 'Rosy Glow' cultivar trees on April 12, 2001. The people who viewed the trees on that date were not provided with any trees or plant propagation material.

5. Prior to May 31, 2001, the 'Rosy Glow' cultivar was not included in any Fleming's Nurseries catalog.

6. I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.



Tony Willcocks

25 OCTOBER, 2004
Date

13 JUN 2000

FLEMING'S CLIENT AGREEMENT

THIS AGREEMENT is made on the date set out in Item 1 of the Schedule ("the Date") (as attached).

BETWEEN Fleming's Nurseries Pty. Ltd., ABN 35 006 532 556 of Fleming Lane, Monbulk, Victoria 3793 (hereinafter referred to as "Fleming's") of the one part

AND the party set out and described in Item 2 of the Schedule (hereinafter referred to as "the Client") of the other part.

NOW THE PARTIES AGREE as follows:—

1. Fleming's agrees to sell and the Client agrees to purchase as and from the date hereof the numbers of cultivars of fruit and/or other trees ("the Plants") set out in Item 3 of the Schedule.
2. The purchase price to be paid for the Plants shall be the price stated in Item 3 of the Schedule, or otherwise as agreed by the parties.
3. In consideration of Fleming's agreement to sell the Plants to the Client, the Client covenants as follows:
 - (a) the Client acknowledges that the Plants which are identified with a number are experimental, unproven, untested and wholly unpredictable as to result.
 - (b) the Client agrees that it is expressly forbidden to undertake or attempt to propagate any numbered plant or plants covered by this agreement, including asexual propagation, mutigenetic alteration, hybridisation, including the growing of any seed produced, cutting, tissue culture, grafting, budding, top working, nor permit others to do so without the prior written consent from Fleming's.
 - (c) If the permission or consent of Fleming's is required to be given in this agreement, Fleming's may give or withhold that permission or consent at Fleming's sole and absolute discretion.
 - (d) the Client agrees that it is expressly forbidden to undertake or attempt to propagate any named Plants covered by this agreement, including cutting, tissue culture, grafting, budding, top working, without prior written consent from Fleming's.

EXHIBIT

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- (e) the Client will not sell, transfer, lease, hire, barter, give or in any other way part with or share the possession of the Plants or propagation material hereby sold without the prior written permission of Fleming's.
 - (f) the Client shall not for a period of twenty-five years from the Date sell, transfer, let or otherwise dispose of the Client's land on which the said Plants are planted unless the purchaser, transferee, lessee or other party proposed to obtain possession of that land ("the Third Party") has entered into an agreement with Fleming's in a form prepared by Fleming's or its Solicitors prohibiting the propagation or asexual reproductions of those Plants by the Third Party and restricting the Third Party's right to sell, transfer, lease or otherwise dispose of the Plants in the same terms as the restriction on the Client contained therein.
4. Where the Client consists of two or more persons their covenants are joint and several. This agreement shall be binding on the parties and their successors, assigns and legal personal representatives.
 5. The Client agrees that Fleming's or its authorised agents shall have the right to enter any land owned, leased or occupied by the Client between 9.00 a.m. and 6.00 p.m. on any day from time to time and search them and examine all plants and propagation materials in them for the purpose of ascertaining whether the Client is breaching the covenants contained in Clause 3 and may remove and take away for examination any propagation materials it requires for that purpose and any failure or refusal by the Client to permit such entry, search, examination or removal shall be prima facie evidence without further proof that the Client has committed a breach of those covenants.
 6. In the event that the Client breaches any of the covenants contained in Clause 3 Fleming's may refuse to sell any further products to the Client and may sue the Client for damages for breach of contract and Fleming's or its authorised agents shall be entitled at the Client's cost to enter onto the Client's property and remove and/or destroy as it sees fit all or any of the Plants or propagation material hereby sold and the Client shall not make any claim whatsoever against Fleming's or its authorised agents as a result or in respect of such entry, removal and/or destruction.
 7. The Client hereby indemnifies and keeps Fleming's indemnified against any and all costs, expenses, liability, loss and damage which Fleming's may suffer or incur as a result of the default or negligence of the Client pursuant to this agreement.

NON-PROPAGATION AGREEMENT SCHEDULE

Item 1 (The Date of the Agreement)

24/05/00

Trees delivered in the 2000 season.

Item 2 (The Client)

Greg Attwood
PO Box 409
TATURA

Customer Number: 333511

VIC 3616

Item 3 (The Plants)

DESCRIPTION	NUMBER	PURCHASE PRICE \$ea.
'Rosy Glow' Apple	1220	\$10.52

Signed



(Customer to sign here on all pages of schedule)

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com
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IN WITNESS WHEREOF the parties have
executed this Agreement the day and year first
hereinbefore written.

THE COMMON SEAL of
Fleming's Nurseries Pty. Ltd.
ABN 35 006 532 556
was hereunto affixed in accordance with its
Articles of Association in the presence of:

.....Director

.....Secretary

SIGNED SEALED AND DELIVERED

by the said C. Stumm.....Client (Customer)

Greg Fittwood.....Print Name

in the presence of:

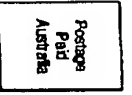
R. Azzopardi.....Witness

Rosemarie Azzopardi.....Print Name

Customer please note: Both Agreement and Schedule must be signed and returned



2nd FLEMING'S FROM 1 NOVEMBER TO 31 NOVEMBER 1998. 10% OFF ALL ORDERS. 10% OFF ALL ORDERS.



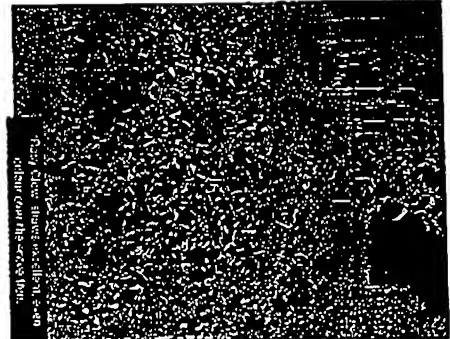
Flemings Nurseries cordially invites you to attend an orchard walk featuring the exciting new 'Rosy Glow' apple

- Early, high colouring 'Pink Lady' mutation
- Grower friendly - minimal leaf stripping or summer pruning

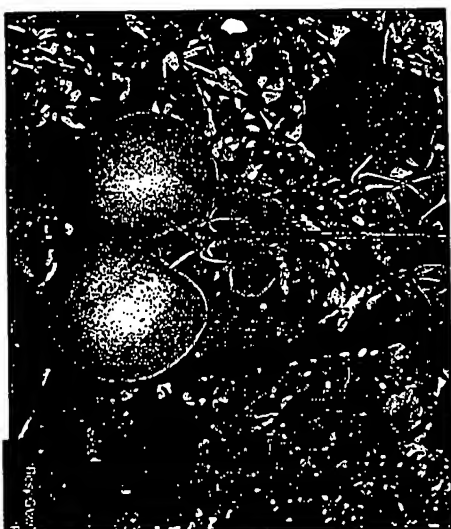
Where: Lenswood, South Australia

When: Thursday 11th April, 2001

Come and see what the future holds for 'Pink Lady' growers ...



Rosy Glow mutation in orchard



Rosy Glow mutation in orchard

R.S.V.P. by Friday 6th April, 2001
by telephoning
Christine at Fleming's Nurseries Pty Ltd (08) 9756 6105



ASN 05 000 662 500



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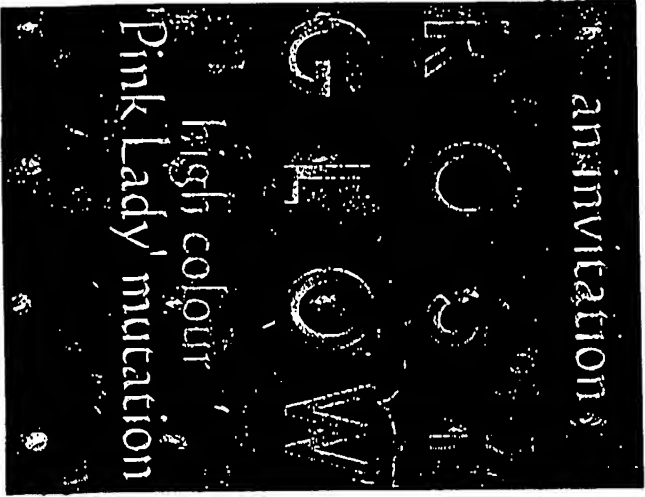
EXHIBIT

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ROSY GLOW A4 (DL) FLYER

FINAL PROOF



High colour
'Pink Lady' mutation

